Supreme Court, U.S.
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No. 96-37

In The

Supreme Court of the United States

October Term, 1995

GARETH REES and TERREL JOHNSON,

Petitioners,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Third District Court Of Appeals Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the First Amendment permit an obscenity prosecution based solely on Petitioners' promoting the film *Midnight Snack*, which they exhibited in the course of a local two-hour television broadcast?

2. Does the *Miller v. California* obscenity test's "serious value" prong include "serious educational value?"

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OPINION BELOW

The opinion of the Texas Court of Appeals, Third District, at Austin (Pet. App. A-1), is reported at 909 S.W.2d 264. The denial of rehearing by the Court of Appeals (Pet. App. A-17) and the refusal of review by the Texas Court of Criminal Appeals (Pet. App. A-18) were without opinion.

JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. §1257(a) because Petitioners' questions are not substantial and were neither pressed nor passed upon below.

STATEMENT OF THE CASE

Petitioners fail to accurately present the facts essential to a ready and adequate understanding of their points. The State of Texas hereby incorporates by reference the detailed and accurate factual background of this case included in the opinion of the Third Court of Appeals. See opinion below, 909 S.W.2d at 266-67. (Pet. App. A-1 through A-5).

STATUTES INVOLVED IN THE CASE

In addition to the federal constitutional provision Petitioners cite, this case also involves the following state statutory provisions:

Texas Penal Code §43.21. Definitions

(a) In this subchapter:

(1) "Obscene" means material or a performance that:

(A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;

(B) depicts or describes:

(i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

(2) "Material" means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner, but does not include an actual three dimensional obscene device.

(3) "Performance" means a play, motion picture, dance, or other exhibition performed before an audience.

(4) "Patently offensive" means so offensive on its face as to affront current community standards of decency.

(5) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

. . .

Texas Penal Code §43.23. Obscenity

. . .

(c) A person commits an offense if, knowing its content and character, he:

(1) promotes or possesses with intent to promote any obscene material or obscene device; or

(2) produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity.

(d) An offense under Subsection (c) is a Class A misdemeanor.

TEX. PENAL CODE ANN. §§43.21, 43.23 (West 1994).

REASONS FOR DENYING THE WRIT

I. This Court lacks jurisdiction to review Petitioners' questions under 28 U.S.C. §1257(a).

The basis of these promotion of obscenity prosecutions was a film entitled *Midnight Snack*, which Petitioners exhibited in the course of one of the *Infosex* television programs. *Infosex* was a regularly scheduled, live broadcast with a call-in format, produced by Petitioner Johnson and hosted by Petitioner Rees. A detailed description of the entire *Infosex* program on the night in question, including *Midnight Snack*, is set out in the Third Court of Appeals' opinion. (Pet. App. A-3 through A-5).

Petitioners first ask whether, in the case of composite materials, the medium of promotion makes a difference in determining what is the material to be taken as a whole. Second, they ask whether the *Miller v. California*, 413 U.S. 15 (1973), "serious literary, artistic, political or scientific" list is exclusive, or whether this list may not also include an "educational" value. They contend the entire *Infosex* program was educational and therefore must have been considered as a whole. Hence, their two questions are logically related in that the first "taken as a whole" question is not reached unless the Court answers Petitioners' second question in the affirmative and includes "serious educational value" in the list of *Miller* redeeming values.

A. Neither of the two constitutional questions presented is substantial in character.

Not every constitutional issue "drawn in question" presents a federal question vesting the Supreme Court with jurisdiction under §1257(a). Rather, the "drawn in question" language of §1257(a) requires that a **substantial** federal question be presented before the Supreme Court's jurisdiction is created. The substantiality requirement is defeated when a decision or decisions of this Court have so explicitly foreclosed the question as to leave no room for real controversy. *Zucht v. King*, 260 U.S. 174, 176 (1922).

Petitioners' second "educational" question is not substantial in character because, under *Miller*, a state law that regulates obscene materials according to the *Miller* guidelines adequately protects First Amendment values. *Miller v. California*, 413 U.S. at 25. The Texas promotion of obscenity statute defines obscenity according to the *Miller* guidelines. *Coon v. State*, 871 S.W.2d 284 (Tex. App. – Fort Worth 1994, pet. ref'd). The *Miller v. California* decision has therefore so explicitly foreclosed Petitioners' second question as to leave no room for real controversy before this Court.

Petitioners' recourse lies with the Texas Legislature, which is free to provide more protections to its citizens under state law and add "educational" to the list of terms provided in *Miller*, just as the Wisconsin Legislature did. *See*, WIS. STAT. §944.21(2)(c)(3). Indeed, the Texas Legislature has seen fit to retain the heightened *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), "utterly without redeeming social value" standard in defining "harmful

materials" under the display of harmful materials to minors statute. TEX. PENAL CODE §43.24 (West 1994). The jury acquitted Petitioners of these charges.

This Court's *Miller* decision forecloses Petitioners' second question. Logic forecloses the first. As noted earlier, whether Petitioners' first "taken as a whole" question is reached depends on this Court's first finding for them on the second "educational" question. Since this Court lacks jurisdiction under §1257(a) to review Petitioners' second question, the first question cannot be reached, and the Court therefore must also lack jurisdiction to review it.

B. Petitioners' questions were not pressed or passed upon below.

The Third Court of Appeals was not asked to decide and did not decide whether the *Miller* list of redeeming values is "talismanic and exclusive," or whether "educational" might not also figure as a fifth adjective in that list. Rather, the issue appealed was whether the trial court had erred in refusing their requested jury instruction that "scientific **includes** educational." (Pet. App. A-35). The Third Court found that question to have been waived, because Petitioners' requested instruction encompassed the entire *Infosex* program and was not

limited to *Midnight Snack*. (Pet. App. A-14, A-15).[1] Having determined that *Midnight Snack* was properly the subject of the jury's deliberations, the Third Court went on to discuss the point only as it pertained to *Midnight Snack*, holding that the trial court had properly instructed the jury in accordance with the relevant state statute. (Pet. App. A-15).

The second question Petitioners now present, whether "educational" is a redeeming value in its own right under *Miller*, or whether, instead, the *Miller* list is "talismanic and exclusive," was first raised in their petition for discretionary review to the Texas Court of Criminal Appeals. That Court denied review without opinion.

Underscoring Petitioners' failure to present their second question is their failure to specifically define "education" at any point in proceedings to date. They concede that the average person applying contemporary community standards would find that *Midnight Snack*, taken as a whole, is patently offensive and appeals to the prurient interest in sex. Nevertheless, juxtaposing *Midnight Snack* against "old Army scare VD films," they contend that promoting material the likes of *Midnight Snack* is the only way to make safer sex techniques "attractive and stimulating" to gay men. As the Third Court of Appeals noted, the overall educational value, if any, of exposure to pornography does not create scientific value. (Pet. App. A-15).

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[1] Petitioners' fifth point of error to the Third Court of Appeals alleged that "[t]he jury charge improperly failed to instruct the jury that it must find **the program** lacked serious educational value to find it obscene."

Moreover, the Third Court of Appeals was not asked to decide and did not decide whether the medium involved in this case dictated a different analysis of the "taken as a whole" issue under *Kois v. Wisconsin*, 408 U.S. 229 (1972). Petitioners mentioned only in passing, on page 11 of their original brief to the Third Court of Appeals, that the medium of promotion was irrelevant in deciding what was the material to be taken as a whole. Whether the medium dictated a different analysis was not urged at all in the petition for discretionary review to the Texas Court of Criminal Appeals.

Generally, the Supreme Court lacks certiorari jurisdiction over a state court decision under 28 U.S.C. §1257(a) unless the federal question was both raised and decided in the state courts below. *Illinois v. Gates*, 462 U.S. 213, 218 (1983). This has come to be known as the "not pressed or passed upon below" rule. *Id.* at 219. The *Gates* petitioners asked this Court to review whether the federal exclusionary rule should be modified. The Court decided it did not have jurisdiction to decide the modification question; while the Illinois state courts had applied the exclusionary rule, the issue of modifying it had been neither pressed nor passed upon below. *Id.* at 222-23.

As in *Gates*, this case does not present the requisite "real contest" below on the two specific questions Petitioners now ask. *Illinois v. Gates*, 462 U.S. at 223. To permit them to raise new questions for the first time to this Court undermines the reasons for the "not pressed or passed upon below" rule. Due regard for the appropriate relationship of this Court to state courts dictates that the lower courts be given the opportunity to consider and decide their own state statutes. *Illinois v. Gates*, 462 U.S. at

219, 221-22. Moreover, to allow Petitioners to argue questions other than those presented below is to ask this Court to exercise scarce judicial resources without the benefit of the lower courts' refinement and resolution of those issues. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992).

While the more accepted rule is that §1257 and its predecessors are jurisdictional rules demanding questions be raised and decided in the lower courts before this Court's jurisdiction is created, some Supreme Court decisions have treated the "not pressed or passed upon below" rule as prudential. *E.g., Vachon v. New Hampshire*, 414 U.S. 478 (1974). However, even if the Court were not jurisdictionally barred from claims not pressed or passed upon in the state courts, "the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review." *Heath v. Alabama*, 474 U.S. 82, 88 (1985).

II. There are no compelling reasons to grant the Writ.

There are no "compelling reasons" to grant the Writ, as required by Supreme Court Rule 10.

A. The court below fully considered and correctly decided the "taken as a whole" issue in accordance with the decisions of this Court and relevant state statutory provisions.

In an attempt to create a conflict between the opinion below and this Court's opinion in *Kois v. Wisconsin*, 408 U.S. 229 (1972), Petitioners speculate the Third Court of

Appeals applied a physical unit test because the physical media involved here differed from the printed newspaper publication in *Kois*.

The Third Court of Appeals' opinion clearly shows that, in its independent review, it fully considered the entire *Infosex* program and decided the "taken as a whole" issue in accordance with the *Kois* thematic unit analysis and the Texas statutory definitions of "material" and "promote." (Pet. App. A-6 through A-9). Carefully and conscientiously detailing its reasons for doing so, the Third Court held that "[t]he *Infosex* call-in program was a sham, a pretense, for the promotion of both the 'shower scene' film and the *Midnight Snack* film." (Pet. App. A-9).

B. Lower courts are not in conflict or in need of guidance on the "taken as a whole" issue.

Petitioners assert the lower courts are in need of guidance because *Kois* has created a rule of law that results in "needless uncertainty," which has "only been exacerbated by developing technology." This assertion is based upon a portion of a Fifth Circuit concurring opinion, quoted in the Third Court's opinion. *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353, 1373-74 (5th Cir. 1980) (Clark, Circuit Judge, concurring). (Pet. App. A-7).

Lower courts are not in conflict or in need of guidance on this issue, and the excerpt from the Fifth Circuit concurring opinion in *Penthouse* is not a compelling reason to grant the Writ. Lower courts consistently apply a thematic unit test in the case of composite materials. *See, e.g., Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir 1980); *Flying Eagle Publications v. United States*,

285 F.2d 307 (1st Cir. 1961); *United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984). That the analysis may be less straightforward in the case of some composite materials merely indicates that some questions are factually more complex than others. It does not render the legal landscape uncertain, as Petitioners contend.

C. Petitioners are asking this Court to exert its jurisdiction to reconsider factual findings.

Although the evidence persuaded both the trial court and the Third Court of Appeals otherwise, to Petitioners "[i]t seems indisputable that the short video in this case was 'rationally related' to the two-hour program." This assertion underscores their wish to relitigate the lower courts' factual findings as to their intent and as to the relatedness of the materials they promoted. Generally, however, the Supreme Court will not exert its jurisdiction merely to reexamine a state court's findings and conclusions of fact. *Grayson v. Harris*, 267 U.S. 352, 358 (1925).

No compelling reason exists in this case for the Court to depart from its longstanding policy.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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